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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 260.

IVY L. LEONARD AND THOMAS B. LEONARD, CO-PARTNERS, TRADING AS I. L. LEONARD & COMPANY,

Plaintiffs in Error and Appellants,

versus

SWEPSON EARLE, CONSERVATION COMMISSIONER OF MARYLAND, AND HEAD OF THE CONSERVATION DEPARTMENT OF THE STATE OF MARYLAND,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF APPELLEE.

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SWEPSON EARLE, Conservation Commissioner of Maryland, and Head of the Conservation Department of the State of Maryland,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

BRIEF ON BEHALF OF APPELLEE.

This is an appeal from the Court of Appeals of Maryland, upholding the validity of an Act of the Maryland Legislature passed at its session of 1927, and known as Chapter 119 of the Acts of that year.

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but can be found in the record of this case, beginning at page 37, and in The Daily Record of Baltimore, Maryland, of Thursday, May 3, 1928.

STATEMENT OF THE CASE.

The case was commenced by the filing of a writ of mandamus by the appellants for the purpose of testing the constitutionality of Chapter 119 of the Acts of 1927. The Act in question repeals and re-enacts, with amendments, Section 91 of Article 72 of the Code of Public General Laws of Maryland, title "Oysters," sub-title "Packing Oysters," and adds a new section to said Article, to be known as Section 91-A. This Act is fully set out in paragraph 7 of the plaintiffs' petition (R., pp. 4 and 5).

Previous to the passage of this Act, a license for the packing of oysters had been required in Maryland since 1884. By Chapter 257 of the Acts of 1884, packers who handled hermetically sealed cove oysters were required to render a monthly statement to the State Treasurer, and pay 1/10 of a cent per bushel on all oysters so packed. The next Act in reference to this subject was Chapter 380 of the Acts of 1894, which repealed and re-enacted Article 72. By Section 66 of this Act, every person, firm or corporation engaged in the business of packing and canning oysters was required to pay $25.00 for such license, and in addition thereto, the sum of $1.00 per thousand bushel for every thousand bushel over ten thousand. This Act further provided that if the packer did not wish to disclose the operation of his business, he might pay a lump sum of $300.00, and in that event, not be required to file reports. This law remained in force until 1906, when it was repealed and re-enacted, making the packers' license the flat sum of $25.00. In 1922 it was again repealed and re-enacted, making a fee of $25.00 for each and every house that the packer operated.

For the past seventy years, the Maryland Legislature has, from time to time, passed legislation for the pro-

tection of the oyster industry. The earlier Acts had to do with the regulation of the taking of the oysters; naming closed seasons, designating areas on which dredges could not operate, prescribing the size of oysters to be taken, etc.; and when it was found that in spite of these regulatory measures, the supply of oysters was rapidly decreasing, laws permitting and protecting the private planting of oysters were adopted. First, by the enactment of local legislation; next, by what was known as the five-acre planting law permitting citizens of the counties bordering on the oyster grounds to take up five acres of oyster bottom; and finally, by the passage of the Haman Oyster Law in 1906, which was afterwards amended by the Sheppard Law in 1914. The last two Acts providing for a survey of all the waters of the State in which oysters grow, for the purpose of establishing which of the bottoms were producing oysters and permitting the barren bottoms to be leased for the purpose of growing oysters thereon by private planting.

Notwithstanding all this regulatory and planting legislation, however, the oyster production declined from over 15,000,000 bushels per annum to less than three million bushels, and it became apparent that other measures must be adopted if the State wished to save its greatest natural resource.

Experiments conducted by the Shell Fish Commission, which was created under the Haman Law, and afterwards by the Conservation Department, which was created by Chapter 682 of the Acts of the General Assembly of Maryland of 1916, and took over the duties of the Shell Fish Commission, which was abolished, assisted by the Federal Government and other States interested in oyster production, showed that the only economical and practical way to rehabilitate depleted oyster bottoms is

by depositing oyster shells thereon, for the purpose of furnishing something for the oyster spat to attach itself to, in order that it may grow and become an oyster. The shells in addition to providing something for the oyster spat to attach itself to provides the lime necessary for the young oysters to form its shells. Experiments have shown that where depleted bottoms are treated in this manner and enough oysters still remain thereon to furnish the spat, that in a few years such bottom will again become productive. The time when oyster shells first acquired a commercial value marks the period when oyster production began to show a decline. Before there was a demand for these shells by poultry food dealers, fertilizer factories, and County Commissioners for road building purposes, they were of no value to the packers and a hindrance to their operations. This being the case, the packers would have the dredge boats after unloading their catch, load their boats with shells before returning to the oyster beds to be thrown overboard on the natural bars from which they had been taken.

If an oyster bottom is allowed to become entirely barren, it is necessary to plant live oysters thereon to furnish the spat, which is a very expensive operation.

After the passage of the Haman Law, citizens of Maryland began leasing barren bottoms and planting seed oysters thereon, but the supply of seed oysters was so limited that such planting could only be conducted on a very small scale. To remedy this condition, the Legislature authorized the Conservation Department to designate, as a seed area, an area at the head of Chesapeake Bay where oysters would not mature, for the reason that the water was too fresh, and allowed those oysters to be taken up under the direction of the Conservation Department, to be placed upon the fertile oyster beds

farther down the bay, and also for sale to private planters, but it developed that the taking of these small oysters from the seed area for the purpose of replanting, was depleting this area also.

In the meantime, the Conservation Department, as stated above, had been experimenting by depositing oyster shells on natural bottoms which had become depleted, but were not entirely barren, and these experiments had proven very satisfactory.

This was the situation that confronted the State when the Legislature convened in 1927.

In the year 1926 the Governor of Maryland had appointed a Sea Food Committee, composed of practical men engaged in the seafood industry, a number of whom were oyster packers, for the purpose of making recommendations to the Legislature to protect the seafood industry. This committee recommended that oyster packers, in addition to paying the annual license of $25.00, be required to turn back to the State 10 per cent. of the shells from the oysters shucked at their packing houses. One-half of these shells to be planted by the Conservation Department upon the natural oyster beds and bars, which had become depleted, and the other half to be planted upon the seed area in order that the State might have sufficient seed oysters to rehabilitate the oyster bottoms which had become absolutely barren and could not be brought back by the planting of shells alone.

The natural oyster beds and bars in the waters of Maryland have always been maintained, protected and regulated by the State in its sovereign capacity as representative of the people, and for the use and benefit of its citizens.

Acting upon the recommendation of the Sea Food Committee, Chapter 119 of the Acts of 1927 was passed by the Legislature, and contained in addition to the recommendation of the committee a provision that the State might in lieu of 10 per cent. of the shells require the packer to pay the value thereof in money to be determined by the market value of the shells as of May 1st, following the close of the oyster packing season on April 25, with a proviso that with the money so obtained, the Conservation Department must purchase other shells to be used for the same purpose. This provision was placed in the Act for the reason that some of the packing houses are located in such a manner that while it would be very advantageous to sell the shells for commercial purposes, it would not be economical or practical for the State to get them for planting, and it would be of advantage to the State and particularly to the citizens thereof engaged in the oyster industry, to let the packer sell these shells, turn over 10 per cent. of the money to the Conservation Department, and have this money reinvested in shells from packing houses located near the area on which the shells are to be planted, thus saving transportation charges to the State.

The Act further provides that all shells must be removed before August 20th, following the packing season, it having been clearly demonstrated by experiment that the best result can be obtained by planting the shells in the late spring or early summer, that is, between the middle of May and the middle of August. This provision imposes no hardship on the packers for the reason that the season for packing oysters is closed from 25th April to the 1st September each year.

The Act in question became effective on the first of June, 1927, the first oyster packing season to be effected by it commencing on the first of September, 1927.

The appellants refused to take out a license to pack oysters under the provisions of the Act in question, and filed a petition in the Baltimore City Court asking for a writ of mandamus to compel the appellee to issue them a license upon the payment by them of the sum of $25.00, as previously required (R. 1).

To this petition an answer was filed by the appellee (R. 22). The appellants demurred to this answer (R. 26) which demurrer was overruled by the lower Court (R. 29), and an order signed dismissing the petition (R. 35). From this order the appellants appealed to the Court of Appeals of Maryland (R. 36). The Court of Appeals of Maryland affirmed the order of the lower Court in an opinion delivered by Chief Judge Bond (R. 37), whereupon the appellants filed a petition for a writ of error and prayer for appeal (R. 47), and assignment of errors (R. 52), whereupon the Court of Appeals of Maryland signed an order allowing writ of error and appeal to the Supreme Court of the United States (R. 55).

ARGUMENT.

I.

THE LAW IN QUESTION ONLY IMPOSES AN OCCUPATIONAL LICENSE TAX OR FEE, IN ASKING FOR THE PAYMENT OF SAME BY DELIVERY OF TEN PER CENT. OF SHELLS OR ITS EQUIVALENT IN MONEY; AND DOES NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY IN VIOLATION OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II.

THE ACT DOES NOT IN ANY WISE RESTRICT OR INTERFERE WITH OR REGULATE THE SHIPMENT OF OYSTERS OR SHELLS EITHER INTO OR OUT OF THE STATE, AND, THEREFORE, IS NOT REPUGNANT TO THE COMMERCE CLAUSE OF THE CONSTITUTION.

III.

THE ACT DOES NOT IMPOSE ANY UNJUST OR IMPROPER RESTRICTIONS OR BURDENS UPON THE LICENSEES OR DENY TO THEM THE EQUAL PROTECTION OF THE LAW.

I.

The chief objection to the Act advanced by counsel for the appellants in the argument of the case in the Maryland Courts, was, that the taking of the shells constitutes a confiscation of private property without due process of law or just compensation, and further that the tax is not uniform in that it taxes the packers to the exclusion of other persons engaged in the oyster industry.

This argument was based on the theory that the tax in question was a tax on property, and not an occupational tax.

The appellee's answer to this argument is that the tax imposed is a license or occupational tax, and, therefore,

is not subject to the rules and limitations applicable to the taxation of property.

When the packer applies for his license he asks the State for the privilege of engaging in the packing of oysters, just as a merchant asks the State for a dealer's license to sell merchandise. The State, by the Act in question, tells him that he can engage in this occupation provided he remunerates the State for the privilege granted by the payment of $25.00 per annum for each packing house operated, and by turning over to the State 10 per cent. of the shells from the oysters packed in his packing house, or its equivalent in money, to be used by the State for the purpose of conserving the oyster industry.

The Chief Judge of the Court of Appeals of Maryland, in deciding this case, said (R. 43):

> "A property contribution as the price of condition of a license or privilege sought, while unusual, is not unprecedented."

And again (R. 42), he states:

> "There is some novelty in exacting a contribution of tangible property, even as a measure of co-operation for the private individual's benefit, or as the condition of a privilege, but novelty alone does not, of course, render it invalid."

Cooley on Taxation, Section 23, Volume 1, page 92, 4th ed., in speaking of taxation in general, says:

> "Taxes are generally demanded in money, and any tax law will be understood to require money when a different intent is not expressed. But if the condition of any state, in the judgment of its legislature, shall require the collection of taxes in kind—that is to say, by the delivery to the proper officers

of a certain proportion of products—or in gold or silver bullion, or in anything different from the legal tender currency of the country, the right to make the requirement is unquestionable, being in conflict with no principle of government, and with no provision of the Federal Constitution. Instances of taxes in kind occurred in the colonial period. A levy is sometimes made payable in labor; but this has commonly been restricted to the labor needed to keep the highways in repair; and while it is in its nature a tax, it partakes, to some extent at least, of a police regulation."

No exception to this rule is to be found in any of the chapters following in his four volumes on this subject.

See also:

Perry vs. Washburn, 20 Cal. 318;
Williams Case, 3 Bland (Md.) 186, 255;
Parkman's Old Regime, 302;
2 Rives' Life of Madison, 146.

In the case of Lane Co. vs. Oregon, which is reported in 7 Wallace (U. S.) 71, 19 L. ed. 101, the Supreme Court of the United States, speaking through Chief Justice Chase, decided that the Legislature of a State may prescribe the manner in which taxes may be collected. The part of the opinion referring to this subject is found on page 105, and is as follows:

"If, therefore, the condition of any State, in the judgment of its Legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a certain proportion of products, or in gold and silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did

not intend, by the general terms of the Currency Act, to restrain the exercise of this power in the manner shown by the Statutes of Oregon."

In the case now before the Court, the Maryland Legislature has directed that the license tax to be paid by the packers of oysters shall be partly paid in kind, that is, by the delivery of 10 per cent. of the shells from the oysters so packed, or its equivalent, to the Conservation Commissioner of Maryland.

The question as to whether a tax of this kind is a tax on property or was valid as an occupational tax under the Police Powers was before the Court of Appeals of Maryland in the cases of State vs. Applegarth, 81 Md. 293, and Applegarth vs. State, 89 Md. 140. These cases came before the Court upon the question of the constitutionality of the oyster packers' license law as enacted by Chapter 380 of the Acts of 1894 of the General Assembly of Maryland. The first case deciding the question of the constitutionality of the Act as a license law for the packing of oysters in Maryland, and the second case decided that the fact that the oysters packed came from without the State did not affect the constitutionality of the Act.

The Act in question imposed a tax of one dollar ($1.00) on each one thousand bushels of oysters packed in addition to a license of twenty five dollars ($25.00). In both cases the Court decided that the tax in question was an occupational tax and was constitutional. It is contended, therefore, that the provision of the Act requiring 10 per cent. of the shells or money in lieu thereof is an occupational tax, and it makes no difference where the oysters come from.

In the case of Applegarth vs. State, 89 Md. 140-142, the Court says:

> "But we fail to comprehend in what respect the Constitution has been violated by the provisions of this Act, unless it be true that every license issued to a merchant is unconstitutional because he must sell goods that were made in, and shipped from some other State. In other words, on whatever stock he purchased outside of the State he would not be required to pay any license.
>
> "To sanction the contention of the appellant would be to grant immunity to the citizens of the State of Virginia by releasing them from taking out certain licenses, which the citizens of Maryland are, under the Act of 1894, required to obtain. We know of no Act ever passed by the Legislature of this State which was intended to confer benefits upon other States, but which denied to this State equal benefits. Mr. Justice Field, delivering the opinion of the Court in the case of Webber vs. Virginia, 103 U. S. 350, says: 'No one questions the general power of the State to require licenses for the various pursuits and occupations conducted within her limits, *and to fix their amount as she choses.*' And again, from the same case: 'A State may require a license for the sale of sewing machines, although the machines are patented under the laws of the United States, where there is no discrimination against machines outside the State.' * * * The right to require the payment of license fees for the privilege of carrying on business of different kinds has been recognized for many years in this State, and the license fees required to be paid have been fixed, in the discretion of the Legislature, according to circumstances and the character of the business."

There is no difference between the Act then under question and the present Act, except that the payment of the license tax is paid in shells or its equivalent in money and the few incidental burdens relied upon by the

appellants, such as the possibility of storage of shells for a few weeks. The Act in question specifically designates the use of the shells or money received in payment of the license—something which the Act of 1894 did not provide. The Act states that the shells shall be restored to the oyster bottoms, or if money is paid, then shells and seed oysters shall be purchased therewith and returned to the bottoms. *In what other way could there be a more direct benefit to the oyster packer than by this method?* Generally when taxes or license fees are paid they go into a common fund of the State and from there are distributed to the various sub-divisions under the direction of the Legislature. If there is anything unconstitutional about this Act it would perhaps be better argument on the part of the remaining citizens of the State to object than it would be for the packers because they get no benefit from these receipts other than, perhaps, to reduce the appropriation which they have been paying each year for the protection and conservation of the oysters. The various legislatures have in the past appropriated great sums of money to protect the natural seafood resources and simultaneously with the passage of the Act of 1927, the State budget provided for an appropriation of $95,000.00 from the State funds for each of the years 1927 and 1928 for the purpose of purchasing shells and seed oysters, in addition to those procured under the provisions of this Act. This amount was about double the amount heretofore appropriated by any Legislature of this State. The same Legislature increased the various other license fees connected with the oyster industry, such as the tongers license, the dredgers license, inspection tax, etc., and provided other regulatory measures for conservation, such as increasing the minimum size of the oysters which may be taken, shortening the season when oysters may be caught, and more liberal leasing laws.

The oystermen themselves, viz. the persons who catch the oysters for a livelihood, together with the oyster packers, viz. those who take the oysters from the shells and place them in containers (the class to which the appellants belong), both demanded legislation for the restoration of the natural oyster beds and bars of the Chesapeake Bay and its tributaries; the Act in question in this case being only one item of the great conservation and restoration program adopted by the 1927 session of the Maryland Legislature.

It might be well to note at this point that while the oyster packers of Maryland get some oysters from leased bottoms and from outside the State for the purpose of shucking and packing, due to the depleted condition of the natural oyster bars, they were just as urgent as the oystermen in insisting on the passage of the legislation referred to, and a large number of these packers are today advocating the tax in question.

The question as to whether this Act falls within the due process clause of the 14th Amendment of the Constitution of the United States, or whether it is within the taxing powers of the State under its police regulations, is the sole question involved in this case. The Act must fail if it is a taking property without due process; whereas, if it is an occupational or privilege tax the question of equal protection of the law or the commerce clause is of no consequence, but these subjects will be touched upon later.

Mr. Lewis, on Eminent Domain, Section 14, says:

> "As we have already seen, private property may be taken or affected for public use, not only under the power of eminent domain, but also under the powers vested in the State, as the Power of Taxa

tion, Police Power, and the War Power. * * * The just compensation required to be made is an equivalent, either in money, or in special benefits to the particular property. In no case is the individual compensated in the matter of money exacted for taxes or loss occasioned by any exercise of police powers. In short, these powers would be rendered nugatory, if such compensation was obligatory in case of their exercise. It is enough that the tax or police regulation promotes, or is calculated or intended to promote, the general welfare. The individual receives his only compensation by sharing in the common benefit * * * it does serve to keep the other powers (meaning taxes and police powers) within their legitimate bounds, but within those bounds it has no application. * * * It is evident that it would absolutely preclude the exercise of the power of taxation or police regulation, if applied thereto; for it is impossible to receive the benefit of a tax until it has been collected and expended, or of a police regulation until it has been made and enforced."

In Section 2 of the same volume, Mr. Lewis classifies the various acts of power which may be legitimately used over private property as follows:

1. Regulating the making of contracts between citizens with respect to property, and prescribe generally as to their validity and effect; for instance: Statute of Frauds, Statute of Wills, etc.

2. Laws for the attachment and sale of property on civil process, the bastardy laws, support of wife and children.

3. Laws imposing fines and forfeitures.

4. Laws regulating public health, safety and welfare, known as Police Power, or the rights of Police Regulation.

5. **The State may exact of the individual a contribution or a portion of his property—based upon some rule of apportionment, or the possession of some privilege or franchise, or the exercise of some trade or calling, in order to provide a fund for defraying the necessary expenses of the government. This is known as the Right of Taxation.**

For the distinction between eminent domain and taxation, see

Lewis on Eminent Domain, Section 4;
Moale vs. Baltimore, 5 Md. 314, 320;
Cooley on Taxation, Sec. 30 (4th ed.).

Livingston vs. City of Paduch, 80 Ky. 660, in quoting *Cooley on Taxation* with approval, says:

> "It is only when statutes are passed which imposes taxes on false or unjust principles, or operate to produce gross inequality so that they cannot be deemed in any sense proportioned in their effect on those who are to bear the public charges, that Courts can interfere and arrest the course of legislation by declaring such enactment void."

It has not been urged by the appellants that the law would be unconstitutional if the license fee was payable in money instead of shells, but it is more or less conceded, we believe, on their part, that there would be no objection to the Act if money was all that was required. It should be borne in mind that the Act provides for the payment in equivalents. The 10 per cent. of shells is the same as the equivalent in money at the market price as of May 1st and vice versa. In other words, the Conservation Commissioner can exact all of the payment in money in lieu of shells. It would, therefore, avail nothing, or at least the objectionable feature of the bill could be avoided in the actual operation of the Act by the

Commisisoner so electing to take money. It is not the test whether it is a tax on property or the taking of property without due process that the Legislature has asked for the payment in any certain manner.

The test is whether the tax or license fee is one which can lawfully be imposed upon the business or occupation of the oyster packers as a revenue measure or under the police powers of the State, to regulate the oyster packing business, by providing for incidental license fee.

A license for the packing of oysters in Maryland has been required since 1884, and has continued in force with slight changes since that time.

See:

Acts of the General Assembly of Maryland,
1884, Chapter 257;
1894, Chapter 380;
1906, Chapter 188;
1922, Chapter 519;

the last act being the one in force at the time of the passage of the Act in question.

These several acts withstood the assaults made upon them in the Maryland Courts on the grounds that they violated (a) Article 23 of the Declaration of Rights of Maryland; (b) Article 3 of the Constitution of Maryland; (c) Articles 4 and 14 of the Constitution of the United States; and the only question involved in this case which has not been raised in the previous ones is the right of the State to require the payment of the tax in oyster shells (the offal from the commodity packed), or its equivalent in money.

A State has a right to devise its own system of taxation free from federal interference.

Kelly vs. Pittsburg, 104 U. S. 78, 26 L. ed. 658.

"It was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation; that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property, as is afforded by the Fifth Amendment against similar legislation by congress; and the federal courts ought not to interfere when what is complained of is the enforcement of the settled laws of the state, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property or deprivation of personal rights."

French vs. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. ed. 879.

The preservation of game and fish is within the proper domain of the police power of the State.

Lawton vs. Steele, ~~152~~ 152 U. S. 133.

Preservation of fish and the regulation of fishing is for the common benefit of the people and legislation directed to that end is a valid exercise of the police power of the State.

Manchester vs. Massachusetts, 139 U. S. 240.

The protection of the game supply is within the well-settled boundaries of the police power of a state.

New York ex rel. Silz vs. Hesterberg, 211 U. S. 31.

The source of the police power as to game birds is the duty of the State to preserve for its people a valuable food supply.

Geer vs. Connecticut, 161 U. S. 519.

If it is deemed for the welfare of a state to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end impose a greater tax upon that part of the industry than upon similar use of other fish or offal of salmon it can hardly be said to be contravening the Federal Constitution. There is nothing in it that prevents a license tax upon the manufacturer of fish oil, fertilizer and fish meal in whole or in part, from herring, even though the tax be greater than that imposed upon similar use of other fish.

Alaska Fish Salting and By-Products Co. vs. Smith, 255 U. S. 44.

Courts in determining what is due process of law in the deprivation of a person of his property, are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has previously been regarded as within the police power.

Sentell vs. New Orleans & C. R. Co., 166 U. S. 698, 17 Sup. Ct. Rep. 693.

The appellants rely upon the Frost Trucking Company vs. R. R. Com., 271 U. S. 583, as being a parallel case with the one now at bar, and quote at some length the opinion rendered by this Court in that case. There is not any similarity or analogy between the two cases. We agree with the Court that it would be depriving one of his property without due process if it was attempted to change the status of the company from a private carrier

to a common carrier, as the duties, burdens and obligations of one are so different from those of the other, but in this case the mere fact that the Act calls for the payment of part of the license tax in shells rather than money does not change the status of the oyster packer, or change any of the fundamental principles of taxation upon which the Act relies.

A similar situation arose in the case of Del., L. & W. R. R. Co. vs. Town of Morristown. There the R. R. Company was asked to relinquish its right and use over certain of its property for the establishment of hackstands for which no just compensation was received by the R. R. Company.

In summing up the question as to whether it is a taking of property without just compensation, or if it falls within the power to tax an occupation or busines, or is under the general police powers of the State, we cannot make it stronger than the law as laid down in the cases referred to above, where Chief Judge Bond says (R. 41):

> "As has been argued for the appellees, the present act may be viewed as imposing a license or occupational tax, in that it makes its demand upon persons who are to engage in a particular occupation, and the demand is to be measured by the volume of business of each one affected. And it is appropriately made upon those persons because it has as its object the repair of damaging effects of the pursuit of their occupation. It seeks its ultimate purpose, the repair, more directly than does the usual occupational tax in demanding a contribution of tangible property rather than of money with which the property might be procured. State vs. Applegarth, supra. The material which will be needed for the repair is material which will be accumulated by the packers themselves, and a contribution in kind rather than one in money seems to be a direct, convenient

arrangement; and it would seem to involve no further reach of governmental power. It seems to us, however, that the act may be accurately described as establishing merely a condition upon which the oyster supply of the State may properly be drawn upon and dealt in, or as fixing a necessary incident of the exercise of the privilege sought. The greater part of the burden of conservation, undertaken largely for the benefit of the packers, for the preservation of their livelihood, indeed, is to be borne by the State at large, and what is demanded of the packers as the condition of their license, may be regarded as a measure of cooperation, one which they are peculiarly equipped to contribute."

II.

As to the Act violating the Commerce Clause of the Constitution, we ask in what way does it do so? Shells are not a commodity which are dealt with by the the oyster packers of this State as an article of import or export trade, and no restrictions have been placed upon them which would in anywise prohibit them from being shipped in or from the State. There is not anywhere in the Record to be found any allegation of any unfair dealings or motives on the part of the State of Maryland in dealing with the oyster business, or any ulterior motive in the passage of this Act, nor can any be found in the Act itself. No question has been raised or even intimated that the Act is any other than a conservation measure designed to protect the oyster business within the State for the benefit of, not only the citizens of the State at large, but particularly those engaged in the business of oyster packing, as well as the catcher, the one upon whom the packer must depend for his supply. It was not designed to prohibit the citizens of another state from packing oysters coming from our State waters, or from the grounds leased by the State to the planters. Neither

does it prohibit the packer from packing oysters coming into the State. The reservation of title in the oysters caught within the State does not enter into this controversy at all. Nothing could be clearer than these facts to show that the Act does not come within the prohibitions of the commerce clause or raise the question as to when title in oysters ceases in the State and becomes the private property of the packers.

Since the decision in this case was given by the Court of Appeals of Maryland, this Court has handed down a decision in the case of Foster-Fountain Packing Company, Inc., et al., vs. Haydel, et al., decided on October 15, 1928, which case while having as a subject matter shrimp, also a sea-food product, and relied on by the appellants as having some bearing upon the case before you, is not at all analogous to this case. There, as the Court very wisely stated, the Louisiana Act attempted, under the guise of conservation, to prohibit the shipments of shrimp with their hulls and heads in tact, from the State, claiming that the hulls were good for fertilizer, when, as a matter of fact, the Court pointed out, very little, if any, of the shrimp offal was ever used for this purpose, and naturally the question of ownership of title played a great part in that case. As stated above, no attempt has been made by Maryland to reserve title in the oysters taken from the oyster beds of the State.

The Court of Appeals of Maryland has decided a number of times, as stated by Chief Judge Bond, that oysters as well as fish and game generally, are originally the property of the State, that is, of the people in their sovereign capacity (R. 40).

Judge Butler in the Foster case quotes from Lacosts vs. Department of Conservation, (La.) 263 U. S. 545, as follows:

> "The wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the State may regulate and control the taking, subsequent use and property rights that may be acquired therein."

He also affirmed the Geer vs. Connecticut case by quoting therefrom:

> "Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the State * * * created internal State commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the United States * * * (p. 532). The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds."

While in this case we do not think the reservation of title is essential, yet we have referred to the above to show that it was not at all necessary to so provide in our laws, as the appellants seem to think. The main object of our act is the purpose of conservation of the oyster supply of the State as distinguished from preventing the shipments of oysters out of the State. It might be well in passing to say that the Act is not applicable at all to the oysters in their raw state, whether they come from the natural beds of our waters, from leased bottoms, or from another State. The oysters in their raw state are undoubtedly the property of the packer, whether he buys

them from the catcher, opens his own oysters or buys them in another State. The meat taken from the oyster is packed in containers. Therefore, no element of restraint of the shipment of oysters in their raw state is anywhere intimated in the Act.

We have already pointed out that the Act is not objectionable to the due process clause, because it is an occupational tax or a regulation under the police power.

The following cases show that it is not objectionable to the commerce clause by reason of oysters coming in from another State.

Applegarth vs. State, 89 Md. 140;
Browning vs. Waycross, 233 U. S. 16;
Askrew vs. Cont. Oil Co., 252 U. S. p. 444;
Leisy vs. Harding, 135 U. S. 100;
Pierce Oil Corp. vs. Hopkins, 264 U. S. 137;
S. O. Co. vs. Brodie, 153 Ark. 114.

III.

While the Act requires the oyster packer to retain upon his premises ten per cent. of the shells from the oysters shucked at his packing house until they are required by the State, or until the 20th of August following the close of the oyster season, in the event that the State decides to take shells instead of their equivalent in money, still this does not impose any considerable burden on the packer for the reason that his packing house cannot be operated from the 25th of April until the first of September (Acts of the General Assembly of Maryland, 1927, Chapter 119, Section 91).

In passing on this question the Maryland Court of Appeals says (R. 45-46):

"The burden is a slight one, no greater than other burdens necessarily imposed on individuals in practical working plans for collecting taxes, as, for instance, the burden imposed upon warehousemen to advance the owners' taxes on goods deposited, as that on retailers of gasoline and oils to collect and pay the taxes on purchases from them. Hannis Distilling Co. vs. Baltimore, 114 Md. 680, 681. Pierce Oil Co. vs. Hopkins, 264 U. S. 137. And we think it is to be classed with those necessary burdens, and is too slight to justify stamping the whole beneficial scheme as one involving unconstitutional discrimination among packers. And especially does this appear true when it is remembered that what is now being considered is the constitutionality of a condition upon a privilege, in a scheme for the packers' own benefit, one which appears to be about as practical and economical a scheme as can be advised. * * *

"The burden which might fall upon packers by requiring them to hold the shells on their premises until the department removes them seems to us an unsubstantial one, to be classed with those temporary burdens incidental to the individual's compliance with a lawful public demand, such as the burden of preparing books or accounts for the assessment of taxes, entry of public officers upon private property for the purposes of preliminary surveys, seizure of milk and other merchandise for tests. State vs. Mayhew, 2 Gill 487, 500; Stewart vs. Baltimore, 7 Md. 500, 516; Lewis, Eminent Domain, Sec. 228. The requirement would, in this aspect, seem analogous to one of the holding of garbage on private property for collection, which is sometimes a requirement against the interest of the owner of the premises. Gardner vs. Michigan, 199 U. S. 325. And apart from these considerations this requirement also seems justified as a reasonable, or even necessary, part of a lawful condition attached to the privilege sought."

It is well known that the oyster packer has been considered in a class that is subject to an occupational tax,

recognized as such in Maryland since 1884, and the test has been both on the flat rate as well as on the amount of business done, and is supported by a number of Supreme Court decisions in addition to the decisions of the highest Court of Maryland.

State vs. Shapiro, 131 Md. 168;
State vs. Applegarth (supra);
Rohr vs. Gray, 80 Md. 276;
S. O. Co. vs. Brodie, 153 Ark. 114;
Ozan Lumber Co. vs. Union Co. Natl. Bank, 207 U. S. 251;
Brown-Foreman Co. vs. Ky., 217 U. S. 563;
So. Western Oil Co. vs. Texas, 217 U. S. 114.

In the case of Pacific American Fisheries vs. Alaska, 269 U. S. 269, 46 Sup. Ct. Rep. 110, the Court said that the imposition of a license tax on fish canners graduated according to the size of the pack is not unconstitutional as discriminating against large canners in favor of small ones, where, because of the expense of operation, the small pack may mean a loss, while a larger one may show a profit, so that a tax may be a just attempt to apportion the burden to probable gain.

Also in Clark vs. Titusville, 184 U. S. 329, 22 Sup. Ct. Rep. 382, speaking of licensing merchants generally, the Court says:

> "An ordinance imposing a license tax upon the merchants of a city, by which they are divided into classes according to the amount of their sales, each class including all whose sales range between a certain minimum and maximum amount, does not violate the equality clause of the United States Constitution, 14th Amendment, although the result is to make persons in different classes pay different rates, and to make those in the same class pay at a different ratio if the amounts of their sales differ."

CONCLUSION.

It is, therefore, respectfully submitted that the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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